DAMAYANTI KANTILAL DOSHI & ANOR

v.

JIGARLAL KANTILAL DOSHI

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
RICHARD MALANJUM JCA
KANG HWEE GEE J
[CIVIL APPEAL NO: J-02-682-2001]
12 DECEMBER 2003

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, appeal against refusal to grant - Injunction was sought to restrain respondent from having access to fund - Whether fund was protected by consent order - Whether non-disclosure of restraining orders made against appellants did not warrant justice of case to be overlooked - Whether issue estoppel had any application - Whether there were serious questions to be tried - Whether respondent was prejudiced - Whether balance of convenience was in favour of appellants - Whether damages an adequate remedy*

This was an appeal against the decision of the learned judicial commissioner ('JC') in refusing to grant an *inter parte* application for an interlocutory injunction by the appellants and setting aside an *ex parte* order of the same injunction. The 1st appellant was the mother of both the 2nd appellant and the respondent. The subject matter of the dispute between the appellants and the respondent revolved around the estate of one late Kantilal Prabhulal Doshi who was the husband of the 1st appellant and the father of both the 2nd appellant and the respondent. All parties were the beneficiaries to the said estate on equal shares with the respondent sharing with his wife. There were several suits pending between the parties. However, the issue before the court was whether the respondent should be restrained from demanding for the release of a sum of money amounting to US$3 million ('the fund') held in an interest bearing account under the name of Towry Law Asset Management Sdn Bhd ('Towry Law') pursuant to a consent order ('the consent order'). The consent order was in relation to a suit ('suit 3863') filed by the respondent against Towry Law for negligence. The respondent demanded Towry Law to release the fund to a company ('OISB') in which he was the majority shareholder and after he had successfully taken steps to remove the 1st and 2nd appellants as directors of OISB and replace them with himself and his wife.

The issues were: (1) whether the fund was protected by the consent order; (2) whether the non-disclosure of earlier restraining orders made against the appellants from interfering in the management of OISB did not warrant the justice of the case to be overlooked; (3) whether issue estoppel had any application; (4) whether there were serious questions to be tried; (5) whether the respondent was prejudiced; (6) whether the balance of convenience lay in favour of the appellants; and (7) whether damages would be an adequate remedy *in lieu* of granting the interim order prayed for.

Held:

Per Richard Malanjum JCA

[1] The learned JC read too much into the consent order. That order was only for Towry Law to crystallize the fund into cash and to deposit the same in an interest bearing account under the name of Towry Law until further order. There was nothing in the consent order that could protect the fund to be released to OISB with the respondent currently the registered majority shareholder therein. (p 446 d)

[2] On the issue of the material non-disclosure of the earlier orders, the paramount consideration was whether the justice of the case required the granting of the interim injunction on the facts presented in the *inter parte* hearing despite the making of an *ex parte* order earlier on. The learned JC took a narrow and strict interpretation of O. 29 r. 1(2B) of the Rules of the High Court 1980 whereby failure to comply would leave no option but to set aside the *ex parte* order and to refuse the interim injunction sought for in the *inter parte* application. If the learned JC had borne in mind that the issue of the shareholding in OISB was still a live issue pending determination, the justice of the case could have been further considered instead of concluding as he did. (pp 446 f & 448 c-d)

[3] There were live issues in the pending suits between the parties. If these issues had been determined, there was no explanation for the respondent not to apply for the striking out of the pending suits. Hence, it was not of much relevance the issue of the appellants not being the directors of OISB or that they were restrained by court orders from interfering in the management of OISB. And for the same reason, issue estoppel had no application. Further, there was nothing to suggest that the respondent was prejudiced in anyway by the application for the *ex parte* injunction. (pp 448 g-h & 449 a-c)

[4] There were live issues awaiting judicial determination. Hence, there were serious questions to be tried. (p 449 f)

[5] The fund and the position of the respondent in OISB and his shareholding were very live issues that were in controversy. To allow the release of the fund to OISB at the behest of the respondent would make the pending live issues mere academic when they finally come up for determination. If those issues were finally determined in favour of the appellants most likely recourse to recover the fund would be difficult if not absent. Therefore, the balance of convenience was in favour of allowing the application for interim relief as prayed for by the appellants. (p 449 h)

[6] On the issue of adequacy of damages, it was obvious that once the fund was released to OISB at the request of the respondent, there was nothing to assure that it was recoverable in the event the appellants succeeded to obtain the prayers sought for in the various actions. Therefore, damages would not be adequate *in lieu* of granting the interim order prayed for. (p 450 a)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan yang arif Pesuruhjaya Kehakiman ('PK') kerana enggan membenarkan permohonan *inter parte* perayu untuk injunksi interlokutori dan kerana membatalkan perintah *ex parte* injunksi tersebut. Perayu pertama adalah ibu kepada perayu kedua dan responden. Perkara yang menjadi pertikaian di antara perayu-perayu dan responden berligar di sekitar pusaka seorang yang telah meninggal, Kantilal Prabhulal Doshi iaitu suami perayu pertama dan bapa perayu kedua dan responden. Pihak-pihak adalah waris yang mempunyai kepentingan sama rata kepada pusaka dengan responden berkongsi kepentingan dengan isterinya. Terdapat juga beberapa guaman yang sedang berjalan di antara mereka. Namun, isu yang berbangkit di hadapan mahkamah adalah sama ada responden harus dihalang dari menuntut pelepasan suatu dana sebanyak US$ 3 juta yang berada dalam satu akaun yang menghasilkan faedah di atas nama Towry Law Asset Management Sdn Bhd ('Towry Law') ekoran suatu perintah persetujuan ('perintah persetujuan'). Perintah persetujuan tersebut adalah berkaitan dengan satu guaman ('guaman 3863') yang difailkan oleh responden terhadap Towry Law kerana kecuaian. Responden menuntut supaya Towry Law melepaskan dana tersebut kepada satu syarikat ('OISB') di mana beliau adalah pemegang saham terbesar setelah berjaya menyingkir perayu pertama dan kedua sebagai pengarah-pengarah syarikat itu dan menggantikan mereka dengan dirinya sendiri dan isterinya.

Isu-isunya adalah: (1) sama ada dana dilindungi oleh perintah persetujuan; (2) sama ada ketidakdedahan perintah halangan terdahulu terhadap perayu-perayu menghalang mereka dari mencampuri pengurusan OISB tidak penting sehingga soal keadilan kes harus dilupakan; (3) sama ada isu estopel terpakai; (4) sama ada wujud persoalan-persoalan serius yang perlu dibicarakan; (5) sama ada responden telah diprejudis; (6) sama ada imbangan keselesaan berpihak kepada perayu-perayu; dan (7) sama ada gantirugi merupakan remedi memadai sebagai ganti perintah interim yang dipohon.

Diputuskan:
Oleh Richard Malanjum HMR

[1] Yang arif PK membaca terlalu banyak ke dalam perintah persetujuan. Perintah itu hanyalah supaya Towry Law menghablurkan wang tabungan kepada tunai dan mendepositkannya atas nama Towry Law ke dalam akaun yang membawa faedah sehingga perintah selanjutnya. Tiada apa-apa di dalam perintah persetujuan yang boleh melindungi dana tersebut dari dilepaskan kepada OISB di mana responden kini merupakan pemegang saham terbesar.

[2] Berkaitan isu ketidakdedahan material perintah-perintah terdahulu, pertimbangan terpenting adalah sama ada keadilan kes menuntut pemberian perintah injunksi interim berdasarkan fakta yang dikemukakan pada pendengaran *inter parte* meskipun wujud perintah *ex parte* sebelumnya. Yang arif PK telah memakai interpretasi yang ketat dan sempit terhadap A. 29 k. 1(2B) Kaedah-kaedah Mahkamah Tinggi 1980 di mana kegagalan mematuhi akan mengakibatkan perintah *ex parte* diketepikan dan permohonan injunksi *inter parte* ditolak. Sekiranya yang arif PK mengambil ingatan bahawa isu pemegangan saham OISB masih merupakan isu hidup yang sedang menunggu keputusan, maka soal keadilan kes masih boleh diberi pertimbangan lanjut oleh beliau tanpa perlu membuat keputusan sepertimana yang dibuatnya.

[3] Terdapat isu-isu hidup dalam guaman-guaman yang sedang berjalan di antara pihak-pihak. Sekiranya isu-isu ini telah diputuskan, tidak ada sebab mengapa responden tidak memohon supaya guaman-guaman tersebut diketepikan. Oleh yang demikian, isu bahawa perayu-perayu bukan pengarah-pengarah OISB ataupun bahawa mereka dihalang oleh perintah mahkamah dari mencampuri urusan OISB tidaklah relevan sangat. Dan atas alasan yang sama, isu estopel juga adalah tidak terpakai. Selain itu, tiada apa-apa yang menunjukkan bahawa responden dengan apa cara pun telah diprejudis oleh permohonan injunksi *ex parte* tersebut.

[4] Terdapat isu-isu hidup yang masih menunggu keputusan. Oleh yang demikian, wujud isu-isu serius yang perlu dibicarakan.

[5] Wang dana dan kedudukan serta pemegangan saham responden dalam OISB merupakan isu-isu hidup yang kontroversi. Membenarkan pelepasan dana kepada OISB atas desakan responden akan membuatkan isu-isu ini menjadi akademik apabila ia dibicarakan. Sekiranya isu-isu tersebut diputuskan dengan berpihak kepada perayu-perayu besar kemungkinan jalan untuk mendapat kembali dana tersebut amat sukar jika tidakpun tertutup terus. Oleh itu, imbangan keselesaan berpihak kepada membenarkan permohonan untuk remedi interim sebagaimana yang dipohon oleh perayu-perayu.

[6] Berkaitan isu kecukupan gantirugi, ianya jelas bahawa sebaik sahaja dana dilepaskan kepada OISB atas permintaan responden, tiada apa yang boleh menjamin bahawa ianya boleh diperoleh kembali jika perayu-perayu berjaya mendapat perintah-perintah yang dipohon mereka dalam guaman-guaman berkenaan. Oleh yang demikian, gantirugi adalah tidak memadai sebagai ganti pemberian perintah interim yang dipohon.

Rayuan dibenarkan.]

Case(s) referred to:

Noor Jahan Abdul Wahab v. MD Yusoff Amanshah & Anor [1994] 2 CLJ 249 HC ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Hong Huat Holdings Sdn Bhd & Ors [1992] 3 CLJ 1525; [1992] 1 CLJ 278 SC ***(refd)***

Salcon Engineering Sdn Bhd v. PRM Energy Systems (M) Sdn Bhd [1994] 1 CLJ 295 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 6, O. 29 r. 1(2)(B)

For the appellant - M David Moraise (Khabir Dhillon); M/s Zaid Ibrahim & Co
For the respondent - Steven Thiru (RR Mahendran); M/s RR Mahendran & Co

[Appeal from High Court, Johor Bahru; Originating Summons No: 24-985-1991]

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum JCA:

Introduction

On 11 June, 2003 we allowed the appeal by the appellants with costs to be taxed thereby granting them the following orders:

(a) that the order to set aside the *ex parte* order dated 17 October 2000 pursuant to encl. 24 was set aside;

(b) that injunction as prayed for in encl. 14 was granted;

(c) that costs to be awarded to the appellants here and in the court below; and

(d) deposit to be refunded to the appellants.

We now state our reasons for coming to such decision.

Background Facts

The parties before us are all members of one family. The 1st appellant is the mother of the 2nd appellant and of the respondent.

The subject of the dispute between the appellants and the respondent revolves around the estate of the late Kantilal Prabhulal Doshi ('Doshi'), who was the husband of the 1st appellant and the father of the 2nd appellant and the respondent. All the parties are beneficiaries to the estate of Doshi on equal share with the respondent sharing with his wife.

Specifically in relation to the matter before us it was on the issue of whether the Respondent should be restrained from demanding for the release of a sum of money last estimated amounting to US$3 million ('the fund') now held in an interest bearing account under the name of Towry Law Asset Management Sdn. Bhd. ('Towry Law') pursuant to the Consent Order ('the 3863 Consent Order') in relation to Suit No. D4-22-3863-1998 ('Suit 3863') filed by the respondent against Towry Law for negligence.

Prior to the death of Doshi the fund was placed with Towry Law as the Fund Manager under the name of a company, Overseas Industries Sdn. Bhd. ('OISB').

The majority of the shares in OISB were registered in the name of the respondent. And when Doshi died the respondent commenced a legal action for a declaration that he was the beneficial owner of the majority of the shares in OISB. In turn the 1st appellant and her younger son Jogesh who was her co-executors of the estate of Doshi filed an action for a declaration that the shares held by the respondent in OISB were held in trust for the benefit of the estate of Doshi.

The respondent by virtue of his shareholding in OISB also sought by an Originating Summons No. 1141 filed in Johor Baru High Court in 1997 ('OS 1141') to have the fund released to him after having taken step to remove the 1st and 2nd appellants as directors of OISB and replacing them by himself and his wife. That move was opposed by the appellants with application for an injunction being made under OS No. 24-985-1991 ('OS 985').

There were also other actions and counter-actions commenced by the parties. And these cases were initially consolidated *vide* Consent Order ('the 195 Consent Order') recorded in connection with Johor Bahru High Court Civil Suit No. 22-195-1991 ('Suit 195') wherein it was agreed that Suit 195 was to be set down for trial and the decision made thereof would bind the other suits pending between the parties. And on 8 May 2002 all the parties agreed to transfer all actions to be heard with OS 1141 in Johor Baru High Court 2. Anyway for this appeal we are only concerned with the application for an injunction by the appellants for the same purpose of restraining the respondent from having possession of the fund. It was filed when the respondent demanded Towry Law to release the fund to OISB after the 1st appellant and Jogesh failed before the Court of Appeal in their move to intervene in OS 1141.

The Decision Of The High Court

At the ex-stage the learned Judicial Commissioner by an order given on 25 October 2000 allowed the application of the appellants for an *ex parte* order to restrain the respondent in his demand for the release of the fund from Towry Law.

However upon hearing the matter on *inter parte* the earlier *ex parte* order was set aside and the application for injunction was refused. An application for Erinford Order was also denied.

In coming to his decision the learned Judicial Commissioner found the following:

(a) that the fund was already protected by the 3863 Consent Order and hence the application for *ex parte* injunction caused untold embarrassment to the Courts that made the earlier Orders including the 195 Order;

(b) that there was material non-disclosure on the issue of *locus standi* on the part of the appellants when applying for the *ex parte* injunction in view of the restraining order made against the appellants on 14 July 1992 in connection with Suit No. 22-169-1991 and hence they were in breach of O. 29 r. 1 (2)(B) of the Rules of the High Court 1980 (RHC 1980) thereby warranting the setting aside of the *ex parte* order;

(c) that there was a failure on the part of the appellants to comply with O. 3 r. 6 of the RHC 1980 before making the *ex parte* application;

(d) that the several court proceedings instituted by the appellants 'smacks of one of the worst cases of abuse of process and thus interlocutory relief should be refused';

(e) that issue estoppel as *res judicata* applies in this case;

(f) that there was an earlier court order which debarred the appellants as directors of OISB;

(g) that the issue of whether there was serious question to be tried no longer pertinent in view of the 195 Consent Order;

(h) that on the balance of convenience it was in favour of the respondent since the fund was the core assets of OISB and it would be detrimental to its operation if it was withheld; and

(i) that on the adequacy of damages there was no challenge in respect of the respondent's ability to meet any claim for damages.

Contentions On Appeal

Before us it was submitted that central to the dispute between the parties was the status of the shareholding of the respondent in OISB and unless determined he should not be allowed to have access to the fund.

And it was highlighted that since there was no order made against the respondent personally in his quest to have access to the fund, such situation had caused several applications to be made to counter the steps taken by him for the release of the fund.

As regards the need for the injunctive relief it was contended that it was due to the lack of probity of the respondent and his attempts to have the fund released which necessitated the *ex parte* application to be made.

In respect of the conclusions made by the learned Judicial Commissioner in the court below the following arguments were submitted:

(i) that the 3863 Consent Order was insufficient to protect the fund from the grasp of the respondent;

(ii) that the issue of material non-disclosure should not be taken to such an extent that the justice of the case at *inter parte* stage was overlooked;

(iii) that there are serious questions to be tried, in particular on those to be tried under Suit No. 195, which involved the status of the 1st appellant and that of the respondent in OISB;

(iv) that the balance of convenience should be in favour of granting the injunction in view of the lack of probity of the respondent and whether he should be allowed to meddle with the fund when his status in OISB is in issue;

(v) that damages would be inadequate since if the respondent is allowed to have the fund it would never be recovered;

(vi) that the merits of the case should be considered instead of rigid application of the RHC 1980;

(vii) that O. 3 r. 6 of the RHC 1980 had been complied with and even if not, the respondent suffered no prejudice; and

(viii) that the principle of issue estoppel is not applicable since the 195 Consent Order is only interlocutory in nature.

Learned counsel for the respondent in reply supported the conclusions of the learned Judicial Commissioner.

Findings

At the outset we would say that the matter before us was an appeal against the decision of the learned Judicial Commissioner in refusing to grant an interlocutory injunction applied for by the appellants. It was an exercise of discretion which an appellate court should not casually interfere unless justified in law. In *Perwira Habib Bank Malaysia Bhd v. Hong Huat Holdings Sdn Bhd & Ors* [1992] 3 CLJ 1525; [1992] 1 CLJ (Rep) 278 it was reiterated that:

> (I)n our view, irrespective of whether an interim injunction is sought on the basis of statutory provisions or on the inherent jurisdiction of the court to restrain abuse of its process, it must be exercised judicially according to law on established principle of granting injunction as enunciated in *American Cyanamid Co v. Ethicon Ltd* 7 which has been consistently applied by the courts in this country.
>
> Although an interlocutory injunction is a discretionary relief vested in the judge of the High Court, and the function of an appellate court is not to exercise an independent discretion on its own, failure to consider statutory provisions and failure to consider balance of convenience entitle this court to rehear the whole application, since … was wrong in law and therefore not an exercise of the judicial discretion. (per Mohd Azmi SCJ)

Hence in considering this appeal the first pertinent question to consider should be on the exercise of discretion by the learned Judicial Commissioner.

We noted that the approach adopted by the learned Judicial Commissioner was to consider the preliminary issues first before examining whether the established tests necessary in an application for an interim injunction had been satisfied.

Now, based on the findings of the learned Judicial Commissioner it is obvious that he was persuaded by the fact that there was already the 3863 Consent Order subsisting that protected the fund. And since the appellants failed to disclose the said Consent Order at the *ex parte* application stage and in view of the provision of O. 29 r. 1(2)(B) of the RHC 1980 which he ruled to be crucial to comply, that added to his reasons for setting aside the *ex parte* injunction.

We considered the above reasons. With respect the learned Judicial Commissioner read too much into the 3863 Consent Order. That Order was only for Towry Law to crystallize the fund into cash and to deposit the same in an interest bearing account under the name of Towry Law until further order. There was nothing in the said Consent Order that could protect the Fund to be released to OISB with the respondent currently the registered majority shareholder therein. Hence we are of the opinion that the learned Judicial Commissioner erred in his finding on this issue.

Next, on the issue of material non-disclosure of the earlier Orders we are inclined to agree with the contention of learned counsel for the appellants that the paramount consideration is whether the justice of the case requires the granting of the interim injunction on the facts presented in an *inter parte* hearing despite the making of an *ex parte* order earlier on. Of course that would entail an examination of the manner in which the non-disclosure was carried out. Indeed if it amounted to an abuse of process then that would have justified the Court in taking the punitive step in not only setting aside the *ex parte* order but also refusing the subsequent application irrespective of its merits. There are a host of judicial pronouncements on this point. We need only to cite a few.

In the case of *Salcon Engineering Sdn Bhd v. PRM Energy Systems (M) Sdn Bhd* [1994] 1 CLJ 295 Anuar J (as he then was) said this at p. 297:

> I am more inclined to follow the rationale in the cases of *Bennett v. The Excelsior Land, Investment and Building Co Ltd,* and Bank 4 and *Broadbent & Ors v. Marshall & Ors* 5, in dealing with situations such as the present case, where a limited injunction is granted *ex parte* until the hearing *inter partes*. In *Bennett* 4 and *Broadbent* 5, it was decided that the question of

non-disclosure was not relevant at the *inter partes* hearing where both sides were obviously represented. If there was non-disclosure, this would go towards the award of costs. I would go further and say that material non-disclosure at the *ex parte* stage might additionally render the plaintiff liable on its undertaking as to damages.

This is a more sensible approach since the task of the court at the *inter partes* hearing is to consider on the basis of all the evidence before it, whether the injunction should be continued or not. I do not agree with the Bennett and Broadbent approach in so far as serious non-disclosure is concerned. In my judgment, where the non-disclosure is very serious so as to amount to a positive misleading of the court, then it becomes a matter which goes into the balance when considering the probity and *bona fides* of the applicant. In such circumstances, the court will look at the applicant with a high degree of circumspection.

The practicality of the Bennett and Broadbent approach is that the court will not, at the inter partes hearing, be encumbered with a forensic study on the question of disclosure. In some cases, such as the present, this is an onerous task involving detailed study of voluminous documents. At the end of this exercise, much time is wasted. I prefer to approach the *inter partes* hearing on a more pragmatic level by considering the merits of continuing the injunction on the material disclosed by both parties.

And in *Noor Jahan bte Abdul Wahab v. MD Yusoff bin Amanshah & Anor* [1994] 2 CLJ 249 Edgar Joseph Jr. SCJ (sitting as High Court Judge) said this at p. 256:

In exercising my discretion under this ground, I have reminded myself of the current approach adopted by the courts. The relevant principles are helpfully summarized for me by Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v. Nicolian International (Textiles) Ltd* [1988] 3 All ER 197:

I will deal first with the application to set aside the *ex parte* order. It is a basic principle, applicable to all *ex parte* applications, that a plaintiff seeking *ex parte* relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the *ex parte* injunction on that ground alone. But if, in the circumstances existing when the matter comes before the court *inter partes*, justice requires an order either continuing the *ex parte* injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an *ex parte* order obtained without due disclosure set aside: there is a discretion in the court whether to do so or not.

> I accept that facts (i), (ii), (iv) and (v) and to a lesser extent facts (iii) and (vi) were material for the court to know, although they are really facts which constitute part of the first defendant's case. It does not, however, necessarily follow that because the plaintiff had failed to disclose these facts that an order for discharge of the injunction must inevitably follow, for the court would still have to consider whether justice requires the injunction to continue. In considering this part of the case, I have asked myself whether the non-disclosure of the facts concerned was so severe that, had there been full disclosure, this court would not have granted the interlocutory injunction. (See *Hong Leong Holdings Ltd v. Sunbird (Pte) Ltd;* 13 *Prof Dr A Kahar Bador & Ors v. N Krishnan & Ors* at p 409.14).

In the present case the learned Judicial Commissioner, with respect, failed to adequately consider the foregoing principle and indeed took quite a narrow and strict interpretation on O. 29 r. 1(2)(B) of the RHC 1980 whereby failure to comply would leave no option but to set aside the *ex parte* order and to refuse the interim injunction sought for in the *inter parte* application.

If the learned Judicial Commissioner had borne in mind that the issue of the shareholding in OISB was still a live issue pending determination, the justice of the case could have been further considered instead of concluding as he did.

It was also the conclusion of the learned Judicial Commissioner that in view of the restraining orders issued against both the appellants and in particular the Court order dated 14 July 1992 wherein it restrained the 2nd appellant from interfering in the management of OISB the incapacity was self-evident to prevent the appellants from 'the injunctive relief qua directors'. In fact it was also for this reason, in addition to the ruling by the Court of Appeal not to allow the appellants to intervene in O.S. 1141 that the learned Judicial Commissioner found issue estoppel applicable on the facts of this case.

In our opinion the learned Judicial Commissioner overlooked the point that there remains one major issue between the parties, namely the status of the Fund in relation to the estate of Doshi and the shareholding of the respondent in OISB. These are live issues in the pending suits between the parties. And in fact Suit 195 addresses the shareholding of the respondent while OS 985 concerns the directorship of the respondent in OISB. If these issues had been determined as suggested by learned counsel for the respondent then there was no explanation given for the respondent not to apply for the striking out of the pending cases. Hence, we do not think it is of much relevance the issue of the appellants not being the directors of OISB or that they were restrained by court orders from interfering in the management of OISB. And for the same reason we are of the view that issue estoppel has no application.

One other procedural point raised by the respondent and accepted by the learned Judicial Commissioner was the failure by the appellants to comply with O. 3 r. 6 of the RHC 1980.

It was the submission of learned counsel for the appellants that compliance was made. And even if there was none the Order did not apply to this case being an urgent application and that there was no prejudice to the respondent in any event.

On this point we are inclined to agree with the learned counsel for the appellants. There was nothing to suggest that the respondent was prejudiced in anyway with the application for the *ex parte* injunction. And indeed as outlined by learned counsel for the appellants notice was given on 29 September 2000 that OS 985 would proceed in relation to the Civil Appeal No. J-02-197-1998 and in the intervention order dated 24 May 2000. Accordingly we find that there is no basis to fault the appellants on this procedural point.

In view of the preliminary reasons for the learned Judicial Commissioner to set aside the *ex parte* order and dismissing the *inter parte* application for injunction and on the basis of the conclusions that we have come, we are of the opinion that this is a proper case for this Court, though an appellate court, to interfere with the exercise of discretion by the court below. And we did so accordingly.

When considering the settled principles governing the grant or refusal of an interlocutory injunction, we think the learned Judicial Commissioner was persuaded by his findings on the issues as discussed above and thus came to the inevitable conclusion that there was no serious question to be tried.

But, with respect, we disagree. As indicated above there are live issues awaiting judicial determination. Hence there are serious questions to be tried.

It was the conclusion of the learned Judicial Commissioner that to allow an interim injunctive relief would deprive OISB of its funds, hence the balance of convenience should tilt against the granting of the interim injunction prayed for.

With respect, we are unable to agree with his conclusion. The fund and the position of the respondent in OISB and his shareholding therein are the very issues that are in controversy. To allow therefore the release of the fund to OISB at the behest of the respondent would make the pending live issues mere academic when they finally come up for determination. And if those issues are finally determined in favour of the appellants, most likely recourse to recover the fund would be difficult if not absence. As such we are therefore of the view that the balance of convenience obviously tilts in favour of allowing the application for interim relief as prayed for by the appellants.

a And on the issue of adequacy of damages it is also obvious that once the fund is released to OISB at the request of the respondent there is nothing to assure that it is recoverable in the event the appellants succeed to obtain the prayers sought for in the various actions. Thus we are of the opinion that damages would not be adequate in lieu of granting the interim order prayed for.

b Accordingly, in exercise of our discretion we set aside the order of the court below and allowed the application by the appellants for the orders as prayed for in encl. 14 until further order.

The appeal by the appellants is therefore allowed with costs to be taxed and *c* the deposit to be refunded to the appellants.

---

d

e

f

g

h

i